MOTION FILED
AUG 7 1997

No. 97-55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FRANK KEATING, Governor of the State of Oklahoma
and KEN FEAGINS, a nonresident individual,

Petitioners,

—v.—

STATE OF OKLAHOMA, ex rel.,
OKLAHOMA TAX COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA—DIVISION NO. 1

MOTION FOR LEAVE TO FILE AND BRIEF OF PASCALE GELLY AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

KEN FEAGINS
(Counsel of Record)
629 24th Avenue, S.W.
Norman, Oklahoma 73069
(405) 360-9700

STANLEY M. WARD
Of Counsel

Attorneys for Amicus Curiae

- 23 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-55

FRANK KEATING, Governor of the State of Oklahoma
and KEN FEAGINS, a nonresident individual,

Petitioners,

—v.—

STATE OF OKLAHOMA, ex rel.,
OKLAHOMA TAX COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA—DIVISION NO. 1

MOTION BY PASCALE GELLY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION

Pascale Gelly ("Gelly") respectfully moves for leave to file the attached brief *amicus curiae*. Consent of the attorneys for the petitioners has been obtained. The consent of the attorneys for the respondent was requested but refused.

My name is Pascale Gelly. I am a French citizen and resident, an associate attorney for a major international law firm in Paris, France. I am licensed to practice law before the Paris Court of Appeals, *i.e.*, avocat a la Cour d'Appel de Paris, and I teach as an adjunct teaching assistant of intellectual property law at the Law School of the University of Sceaux - Paris XI.

I received my LL.M. degree in law from Columbia Law School. My interest in the case at bar is primarily academic, stemming from my international background and legal training in both France and the United States. I am intrigued by the practical operation of various state laws upon United States citizens in light of both state and federal interests under the United States Constitution.

More importantly, however, is my observation that France does not take into account the extraterritorial income of nonresident taxpayers when calculating their income tax liability. France considers only the nonresident's income earned in France. Section 4A of the French General Tax Code.

I desire to participate *amicus curiae* "[a]s *Abbott's Dictionary of Terms and Phrases* describes it:

> "A friend of the court. A term applied to a bystander, who without having an interest in the cause, of his [or her] knowledge makes suggestion on a point of law or of fact for the information of the presiding judge."

Samuel Krislov, *The Amicus Curiae Brief: From Friendship To Advocacy*, 72 Yale L.J. 694 (1963).

My perspective on the issue is unique in that it is presented from the eyes of a third party foreign citizen who practices and teaches intellectual property law in France. I desire to submit the attached brief *amicus curiae* in order to provide this Court with an international perspective as a French citizen, regarding Section 2362 of the Oklahoma Tax Code and its potential negative impact on interstate trade and its potential corresponding detrimental effect on the relationships between various states.

My observations regarding Section 2362 of the Oklahoma Tax Code are as follows:

1. The New Statute Is Unjustified

The essence of State law is to have a territorial application. It should apply to situations which are within the borders of the relevant State.

It is obvious that the new Section 2362 has an extraterritorial application insofar as it applies to economical situations which do not have any relationship with the State of Oklahoma. Indeed, the new statute aims at taking into consideration for the calculation of state income, tax revenues acquired without any direct nor indirect link with the economy of Oklahoma since said revenues do not have to derive from activities performed within the borders of the State of Oklahoma.

Reviewing the decision of the Oklahoma Court of Appeals, *i.e., Walters, et al., v. State of Oklahoma, ex. rel., Oklahoma Tax Comm'n*, 935 P.2d 398 (Okla. Ct. App. 1996), where Section 2362 had been challenged, two arguments struck me: I read that the purpose of the new statute is not to levy tax and that it is not based on taxing out-of-state income.

First of all, a change in tax law is never innocent; it aims either at decreasing taxes or at increasing them. In this case, the purpose is clear: if the applicable tax rate is determined by the amount of income of a person, the more sources of income are taken into consideration to set the tax rate, the higher the rate is and ineluctably the higher the taxes are.

Besides, even if out-of-state income is not directly taxed, it is used to determine the applicable tax rate. It is then obvious that the scheme organized by Section 2362 has been set up to dissimulate an indirect tax on out-of-state income.

To take an example, a nonresident which could be a potential client of mine located in Texas but having also activities in Oklahoma would see his or her general taxation increase by the application of Section 2362. Lets say, for example, that he/she earns $500,000.00 in Texas and $200,000.00 in

Oklahoma in 1997 and that income tax rates in Oklahoma are of 8% for an income between $100,000.00 and $300,000.00 and 10% for an income between $300,000.00 and $1,000,000.00. If only revenues earned in Oklahoma were taken into consideration, the rate of tax would be 8%, but if the rate determination is also based on Texan revenues, the rate would be 10%.

The issue is to search for what is the justification for such an increase in taxes to be paid. The justification is merely that an extra territorial event, *i.e.*, Texan income, is being appropriated by the State of Oklahoma although there is no economical link between the source of income and the State of Oklahoma. Oklahoma is simply creating with Section 2362 a legal link where there is no economical link within its territory. Section 2362 has then an extraterritorial application which seems to me as going beyond what should be a State's authority, with no other justification other than increasing taxes.

2. Section 2362 May Be Detrimental To Interstate Commerce

The amendment to Section 2362 is very likely to have detrimental effects on interstate commerce. Instead of making efforts to develop his or her activities in Oklahoma, this potential client of mine may elect to concentrate his or her efforts in the Texas market.

For example, if my potential client were to earn income in five (5) states, each having a progressive income tax law similar to Section 2362, his or her income earned in those states would be taken into account for the purpose of determining his or her income earned in those states would be taken into account for the purpose of determining his or her tax rate in each State and would effect a larger income tax paid to each State. For each additional state, the increase in my client's state income tax liability would be compounded and delete-

rious to any incentive to develop economic activities in those states. Who would want to develop activities in a State where nonresidents are taxed under such circumstances?

If the constitutionality of Section 2362 is upheld, other states may be encouraged to enact similar laws. As more states follow this trend, it is easy to imagine that it would lead to conflicts between the states in the form of retaliatory legislation.

Accordingly, Pascale Gelly respectfully moves for leave to file the attached brief *amicus curiae*.

Respectfully submitted,

/s/ KEN FEAGINS
KEN FEAGINS
(Counsel of Record)
629 24th Avenue, S.W.
Norman, Oklahoma 73069
(405) 360-9700

STANLEY M. WARD
Of Counsel

Date: August 7, 1997

Attorneys for Amicus Curiae

QUESTIONS PRESENTED

1. Is this Court's prior decision in *Maxwell v. Bugbee*, 250 U.S. 525 (1919), viable under *Stare Decisis*?

2. Whether the Oklahoma Court of Appeals has read *Maxwell* too broadly in light of Footnote Number 11 in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S.Ct. 2214, 2222 n.11 (1995).

3. Should the rational of *Maxwell v. Bugbee*, 250 U.S. 525 (1919) be applied to a progressive state income tax?

PARTIES TO THE PROCEEDING

Respondent the State of Oklahoma, ex rel., the Oklahoma Tax Commission was the Respondent-Appellee below. Petitioner Governor Frank Keating succeeded Governor David Walters as Governor of the State of Oklahoma and is automatically substituted as a party pursuant to Sup.Ct.Rule 35.3. Governor Walters and Ken Feagins were the Petitioners-Appellants below.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

A. The Opinion Below, The Decisions Of Other State Courts of Last Resort, And The Decision Of United States Court Of Appeals For The Tenth Circuit, Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court 4

B. The Opinion Below Presents Important Questions Touching The Accommodation Of State And Federal Interests Under The Constitution 10

CONCLUSION 11

TABLE OF AUTHORITIES

Cases	PAGE
Aronov v. Secretary of Revenue, Dep't of Revenue, State of North Carolina, 371 S.E.2d 468, 470-71 (N.C. 1988), *cert. denied*, 489 U.S. 1096 (1989).	3
Brady v. State, 80 N.Y.2d 596, 592 N.Y.S.2d 955, 607 N.E.2d 1060, 1063-65 (N.Y. 1992), *cert. denied*, 509 U.S. 905 (1993)	3
Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-409 n.2 (1932) (Brandeis, J., dissenting)	5
Edelman v. Jordan, 415 U.S. 651, 671 n.14 (1974)	5
Frick v. Pennsylvania, 268 U.S. 473, 495 (1925)	8
Gideon v. Wainwright, 372 U.S. 335 (1963)	5
Henderson v. Mayor of New York, 92 U.S. 259, 268	8
Kosydar v. National Cash Register, 417 U.S. 62, 65 (1974)	10, 11
Lawrence v. State Tax Commission, 286 U.S. 276, 280 (1932)	8
Malloy v. Hogan, 378 U.S. 1 (1964)	5
Matteson v. Director of Revenue, State of Missouri, 909 S.W.2d 356, 359 (Mo. 1995)	3
Maxwell v. Bugbee, 250 U.S. 525 (1919)	3, 4, 5, 6, 7, 8, 9, 10
Oklahoma Tax Comm'n v, Chickasaw Nation, 115 S.Ct. 2214, 2222 n.11 (1995)	3, 4, 5, 9, 10
Oregon v. Kennedy, 456 U.S. 667, 668-69 (1982)	4

PAGE

Oregon v. Mathiason, 429 U.S. 492, 493 (1977) 9

Shaffer v. Carter, 252 U.S. 37 (1920) 9, 10

Stevens v. State Tax Assessor, 571 A.2d 1195, 1197 (Me. 1990), *cert. denied*, 498 U.S. 819 (1990) ... 3

U.S. v. Kansas, 810 F.2d 935, 938 (10th Cir. 1987) ... 3

Walters, et al., v. State of Oklahoma, ex rel., Oklahoma Tax Commission, 935 P.2d 398, 402 (Okla. Ct. App. 1996)..... 3

Wheeler v. State, 127 Vt. 361, 249 A.2d 887, *appeal dismissed*, 396 U.S. 4 (1969) 3

Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940) .. 8

Rules

Sup. Ct. R. 10(c) 4

Secondary Authority

William O. Douglas, *Stare Decisis*, 49 Colum.L.Rev. 735 (1949) 6

Walter Hellerstein, *Some Reflections On The State Taxation Of A Nonresident's Personal Income*, 72 Mich.L.Rev. 1309 (1974)..... 8

Charles L.B. Lowndes, *Rate and Measure in Jurisdiction to Tax—Aftermath of Maxwell v. Bugbee*, 49 Harv.L.Rev. 756 (1936) 8

Robert L. Stern et al., *Supreme Court Practice* 209-210 (7th ed. 1993)..... 4

PAGE

Constitutional Provisions

U.S. Const. amend XIV, § 1 ..... 3, 11

U.S. Const. Art. I, § 10, cl. 2 11

Statutes

68 O.S. 1991, § 2362 .....2, 3, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-55

FRANK KEATING, Governor of the State of Oklahoma
and KEN FEAGINS, a nonresident individual,

Petitioners,

—v.—

STATE OF OKLAHOMA, ex rel.,
OKLAHOMA TAX COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA—DIVISION NO. 1

BRIEF OF PASCALE GELLY AS *AMICUS CURIAE* IN SUPPORT OF PETITION

INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* appears in the foregoing motion.[1]

[1] *Counsel of Record* for Petitioners, Ken Feagins, authored this brief. Sup.Ct.R. 37.6.

STATEMENT OF THE CASE

Oklahoma has a progressive income taxation scheme. Under a progressive tax system, the tax rate of a person who earns $50,000.00 per year is higher than that an individual who earns $5,000.00. Petitioners seek certiorari to review an opinion of the Court of Appeals of the State of Oklahoma - Division No. 1, which affirmed the trial court's judgment for Respondent. At issue is the constitutionality of Section 27 of Senate Bill 1121, which amended Section 2362 of the Oklahoma Tax Code (Okla. Stat. tit. 68 § 2362 (1994)) ("Section 2362").

The amendment to Section 2362 changed the method of calculating the state income tax liability of **nonresident** individuals. Prior to the amendment, Section 2362 provided that the taxable income of a nonresident individual was the same as if he or she were a resident individual and the nonresident's adjusted gross income as reported to the federal government was excludable from state taxable income unless the income was attributable to ownership of property, conduct of business, trade, or profession, or other business or property in Oklahoma. Section 2362 currently takes into account a nonresident's out-of-state income having no nexus with the State. As a direct result of the higher tax rate imposed by the Section 2362's inclusion of the nonresident taxpayer's out-of-state income, the current economic reality facing nonresident state income taxpayers in Oklahoma is more money out-of-pocket, paid to the Oklahoma Tax Commission in Oklahoma Income tax.

Prior to the amendment to Section 2362, the Oklahoma Tax Commission predicted that the amendment would raise an additional 18 million dollars ($18,000,000.00) per year in revenue.

Petitioners commenced this action in state district court and challenged the constitutionality of Section 2362 under the

Oklahoma and United States Constitutions. Petitioners' federal constitutional claims included the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, the Privileges and Immunities Clause and the Commerce Clause of the United States Constitution. The Oklahoma Court of Appeals rejected Petitioners' federal constitutional challenges to Section 2362 by adopting a formalistic approach to the issue currently raised by the Petition. *See Walters, et al. v. State of Oklahoma, ex rel., Oklahoma Tax Comm'n*, 935 P.2d 398 (Okla. Ct. App. 1996) Petition at 7a.

Petitioners' case is the latest in a series of recent challenges to the decisions of state courts of last resort that have relied upon this Court's prior decision in *Maxwell v. Bugbee*, 250 U.S. 525 (1919), to uphold similar state progressive income taxation schemes. By taking nonresidents' out-of-state income into account in order to impose a higher tax rate on their instate income, Section 2362 indirectly taxes the extraterritorial income of nonresidents and imposes an income tax derived from sources beyond the borders of Oklahoma.

As in *Matteson v. Director of Revenue, State of Missouri*, 909 S.W.2d 356, 358-59 (Mo. 1995); *Brady v. State*, 607 N.E.2d 1060 (N.Y. Ct. App. 1992), *cert. denied*, 113 S.Ct. 2998 (1993); *Stevens v. State Tax Assessor*, 571 A.2d 1195, 1197 (Me. 1990), *cert. denied*, 498 U.S. 819 (1990); *Aronov v. Secretary of Revenue*, 371 S.E.2d 468, 471 (N.C. 1988), *cert. denied*, 109 S.Ct. 1568, *reh'g denied*, 489 U.S. 1096 (1989); *Wheeler v. State*, 249 A.2d 887, 891 (Vt. 1969), *appeal dismissed*, 396 U.S. 4 (1969), *and United States v. Kansas*, 810 F.2d 935, 938 (10th Cir. 1987), in *Walters et al., v. State of Oklahoma, ex rel., Oklahoma Tax Commission*, 935 P.2d 398 (Okla. Ct. App. 1996), the Oklahoma Court of Appeals ignored this Court's recent decision in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 1155 Ct. 2214, 2222 n.11 (1995). Rather than follow *Chickasaw Nation*, the Court below relied upon and extended the *Maxwell* holding.

In each of the foregoing decisions, the court decided a substantial and unsettled question arising under the Constitution by *extending* the *Maxwell* holding, which specifically addressed a New Jersey progressive estate "death" tax, to a state income taxation scheme. Each court relied on *Maxwell* to uphold under the federal constitution the inclusion in a state progressive income taxation scheme a nonresident's extraterritorial income having no nexus to the taxing jurisdiction in order to impose a higher tax rate on the nonresident's instate income. The result—a larger tax, derived from sources beyond the borders of Oklahoma.

The Petitioners herein are the most recent participants in this expanding waive of national controversy.

REASONS FOR GRANTING THE WRIT

The Petition for a Writ of Certiorari in this case should be granted for reasons stemming from one specifically set forth in Rule 10(c) of the Rules of the United States Supreme Court, because the Oklahoma Court of Appeals, several other state courts of last resort, and the United States Court of Appeals for the Tenth Circuit have "decided an important question of federal law that has not been, but should be, settled by this Court". Sup.Ct.R. 10(c).

A. The Opinion Below, The Decisions Of Other State Courts of Last Resort, And The Decision Of United States Court Of Appeals For The Tenth Circuit, Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court

Certiorari may be granted despite the absence of a conflict where a state court has decided a substantial and unsettled federal question arising under the Constitution. *See*, Sup.Ct.R. 10(c); Robert L. Stern *et al.*, *Supreme Court Practice* 209-210 (7th ed. 1993) (*citing Oregon v. Kennedy*, 456 U.S. 667, 668-69 (1982)). By ignoring footnote number 11 in *Chickasaw*

Nation and relying on *Maxwell* to uphold under the federal Due Process Clause the state's inclusion of nonresidents' extraterritorial—nontaxable—income to determine the tax rate in a progressive income taxation scheme, the Court below decided an important and substantial federal question arising under the U.S. Constitution that has not been resolved by this Court.

Accordingly, despite the absence of a conflict among the lower courts, this Court should grant certiorari in order to resolve the specific federal question raised by the Petition. *See, e.g., Malloy v. Hogan*, 378 U.S. 1 (1964); *Gideon v. Wainwright*, 371 U.S. 335 (1963). *See also, Chickasaw Nation*, 115 S.Ct. at 2222 n.11.

1. *Maxwell* Is No Longer Viable Under *Stare Decisis*

Because the issue raised by the Petition is a constitutional question, this Court is less constrained by the principle of *stare decisis*:

> " '*Stare decisis* is usually a wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. **But in cases involving the Federal Constitution**, where correction through legislative action is practically impossible, **this Court has often overruled its earlier decisions**. The Court bows to lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.' "

Edelman v. Jordan, 415 U.S. 651, 671 n.14 (1974) (*citing Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (1932) (Brandeis, J., dissenting)) (emphasis added). In addition, Justice Douglas observed that "[t]he place of *stare decisis* in con-

stitutional law is even more tenuous" and "[s]o far as constitutional law is concerned *stare decisis* must give way before the dynamic component of history." William O. Douglas, *Stare Decisis*, 49 Colum.L.Rev. 735, 736-37 (1949).

Historically, this Court has been inclined to overrule on constitutional grounds cases related to the taxing power of state governments. For example, during one thirty-year period between 1860 and 1890, this Court overruled (expressly or in effect) eighteen controlling precedents. *See, id.* In another period "from 1937-March 28, 1949", out of 30 cases the Court overruled, 21 of those were on constitutional grounds. *See, id.* And out of those 21 cases this Court overruled on constitutional grounds, the "largest group—8 in number—related to the taxing power of state and federal governments". *Id.* at 743. "Tax rates had become more burdensome than ever before in our history". *Id.*

In *Maxwell*, this Court implemented a formalistic approach acceptable in 1919 to review a New Jersey progressive inheritance tax statute that required the inclusion of the entire estate of a nonresident decedent, wherever the property was located, to determine the rate by which the New Jersey property would be taxed. The New Jersey statute subsequently reduced the tax amount to reflect the percentage of the nonresident decedent's estate located in New Jersey. *Maxwell*, 250 U.S. at 532-33. A divided Court (5/4 decision) upheld the New Jersey inheritance statute and rejected the federal constitutional challenges to the statute, including Due Process.

Five members of the divided Court employed a formalistic approach to decision-making and stated:

> "It is not disputed that, consistently with the Federal Constitution, **a State may not tax property beyond its territorial jurisdiction**, *but* **the subject-matter here regulated** is a *privilege to succeed to property* ***which is within the jurisdiction*** *of the State*.
>
> * * *

> In the present case the State imposes a *privilege tax*, clearly within its authority, and it has adopted as *a measure of that tax* the proportion which the specified local property bears to the entire estate of the decedent. The transfer of certain property within the State is taxed by a rule which considers the entire estate in arriving at the amount of tax. *It is in no just sense a tax upon foreign property, real or personal.*"

Maxwell, 250 U.S. at 539 (emphasis added).

On the other hand, four members of the Court, including Justice Holmes, applied an **economic realities and practical operation** approach and determined that the exaction from nonresident decedents amounted to an indirect tax. The economic reality was an unconstitutional deprivation of property without due process.

Justice Holmes stated in relevant part:

> "It seems to me that *when property outside the State is taken into account* ***for the purpose of increasing the tax upon property within it, the property outside is taxed in effect,*** *no matter what form of words may be used.* It appears to me that this cannot be done, even if it should be done in such a way as to secure equality between residents in New Jersey and those in other States."

Maxwell, 250 U.S. at 544 (Holmes, J., dissenting) (emphasis added).

Since *Maxwell* was decided at the turn of the century, historic events have occurred which make *Maxwell* obsolete in light of current economic conditions and social policies in this country. For example, the term "interstate commerce" has a vastly different connotation and meaning in 1997 than it did in 1919. It is quite common in 1997 for a resident of one state to earn income in several states and to be taxed accordingly by those states and mere days ago, the U.S. Congress enacted historic tax legislation unprecedented in recent times!

Moreover, since *Maxwell* this Court has rejected the antiquated formalism approach to decision-making. *See, e.g., Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 443-44 (1940).

In *J.C. Penney*, this Court stated:

> "A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the state court. **But the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction.** 'In whatever language a statute may be framed, **its purpose must be determined by its natural and reasonable effect.**' *Henderson v. Mayor of New York*, 92 U.S. 259, 268. Such has been the repeated import of the cases which only recently were well summarized by the guiding formulation for adjudicating a tax measure, that '**in passing on its constitutionality we are concerned only with its practical operation**, *not its definition or the precise form of descriptive words which may be applied to it.*' *Lawrence v. State Tax Commission*, 286 U.S. 276, 280."

Wisconsin v. J.C. Penney Co., 311 U.S. at 443-44 (emphasis added).

The majority's holding in *Maxwell* has subsequently been called into question by this Court and members of the academy. *See Frick v. Pennsylvania*, 268 U.S. 473, 495 (1924) (*noting* that the *Maxwell* holding "is on the border line, as is evidenced by the dissent of four members of the court."). *See*, Walter Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 Mich.L.Rev.1308, 1317 n.53 (1974); Charles L.B. Lowndes, *Rate and Measure in Jurisdiction to Tax—Aftermath of Maxwell v. Bugbee*, 49 Harv.L.Rev. 756, 768-773 (1936) (*discussing* the application of the Maxwell holding to a progressive income tax); *id.* at 770 (stating "[i]t is difficult, however, to imagine anything more iniquitously unfair than the application of the *Maxwell*

v. Bugbee formula to income taxation in the present state of the decisions on state jurisdiction to tax income.").

In *Chickasaw Nation*, this Court recently stated that "a jurisdiction, such as Oklahoma, may tax *all* the income *of its residents*, even income earned outside the taxing jurisdiction". As to the **income** of **nonresidents**, however, a taxing jurisdiction such as Oklahoma **is much more restricted in its power to tax** and must tax only the **income derived from sources within the borders of the State**:

> "**For nonresidents**, *in contrast*, jurisdictions generally may tax **only income earned *within the jurisdiction***. See *Shaffer v. Carter*, 252 U.S. 37, 57, 40 S.Ct. 221, 227, 64 L.Ed. 445 (1920) (as to residents, a State 'may, and does, exert its taxing power over their income from all sources'; **as to nonresidents**, '*the tax is only on such income* as is derived from . . . **sources [within the State]**')"

Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S.Ct. 2214, 2222 n.11 (1995) (emphasis added).

Times have changed dramatically since *Maxwell* was decided. Accordingly, because the issue raised by the Petition is a constitutional question, in light of footnote No. 11 in *Chickasaw Nation*, wisdom, the rule of reason and the doctrine of *stare decisis* should lead this Court to revisit, distinguish, modify or simply overrule its prior decision in *Maxwell* to fit today's current facts.

2. The State Court Below Has Read *Maxwell* Too Broadly

This Court may grant certiorari to determine whether the state court has properly interpreted, applied, or extended a prior decision of this Court. *Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (certiorari granted because state court "has read *Miranda* too broadly"). In light of footnote No. 11 in *Chickasaw Nation*, it is obvious that the Oklahoma Court below has read *Maxwell* too broadly.

The *Maxwell* decision addressed a progressive state privilege **death** tax, not a progressive state **income** tax such as Section 2362. Moreover, in *Oklahoma Tax Comm'n v. Chickasaw Nation*, this Court clearly articulated a limitation of a State's taxing power in relation to a nonresident's extraterritorial income:

> "**For nonresidents**, *in contrast*, jurisdictions generally may tax **only income earned *within the jurisdiction***. See *Shaffer v. Carter*, 252 U.S. 37, 57, 40 S.Ct. 221, 227, 64 L.Ed. 445 (1920) (as to residents, a State 'may, and does, exert its taxing power over their income from all sources'; **as to nonresidents**, '*the tax is only on such income* as is derived from . . . **sources [within the State]**')"

Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S.Ct. 2214, 2222 n.11 (emphasis added).

By ignoring Footnote No. 11 and relying instead on *Maxwell* to uphold Oklahoma's exertion of its taxing power to nonresidents' income from sources beyond the borders of the State, the Oklahoma Court of Appeals inappropriately upheld an income tax on nonresidents in that the tax rate pursuant to Section 2362 leads to the imposition of an income tax on nonresidents that is derived from sources beyond the borders of Oklahoma.

Accordingly, certiorari should issue in this case.

B. The Opinion Below Presents Important Questions Touching The Accommodation Of State And Federal Interests Under The Constitution.

This Court may grant certiorari when the state court decision seems "to present important questions touching the accommodation of state and federal interests under the Constitution." *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65 (1974). The issue in *Kosydar* was whether the assessment of an ad valorem personal property tax by the State of

Ohio pursuant to its state tax laws upon certain property in storage awaiting export was in conflict with the federal Constitution's Import-Export Clause, Art.I, § 10, cl. 2, which provides exports with immunity from state taxation. The Ohio Supreme Court had interpreted the federal constitutional provision in conjunction with the State of Ohio's tax laws. Because this Court determined that "the case seemed to present important questions touching the accommodation of state and federal interests under the Constitution", certiorari was granted. *Kosydar*, 417 U.S. at 65.

The issue raised in the Petition is whether Section 2362 of the Oklahoma Tax Code offends the Due Process Clause of the Fourteenth Amendment to the United States Constitution by an indirect tax of a nonresident's income derived from sources beyond the borders of Oklahoma.

Because this case also seems to "present important questions touching the accommodation of state and federal interests under the Constitution", this Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: August 7, 1997.

Respectfully submitted,

KEN FEAGINS,
(Counsel of Record)
629 24th Avenue, S.W.
Norman, Oklahoma 73069
(405) 360-9700

STANLEY M. WARD
Of Counsel

Attorneys for Amicus Curiae